ABDUL LATIFF AVARATHAR v. LILY MUDA

[F.C. (Lee Hun Hoe C.J., Wan Suleiman F.J. & Tan Chiaw Thong J.) September 7, 1981]

[Kuching — Federal Court Civil Appeal No. 220 of 1980]

Native Customary Law — Harta Sepencarian — Dissolution of Marriage — Order for division of harta pencarian made by Native Officer's Court — No appeal brought from decision of Native Court — Action brought in High Court — Proceedings stayed.

In this case the appellant had invested in a piece of land in the name of his wife, the respondent. The respondent subsequently sued for divorce and the marriage was dissolved by the Native Officer's Court. The court ordered that all properties acquired during the marriage be divided between the parties in the proportion of one-third to the respondent and two-thirds to the appellant. The appellant did not proceed with the appeal against the decision of the Native Officer's Court but instead brought an action in the High Court for a declaration that he is the owner of the land. The learned trial judge stayed all proceedings pending the outcome of the appeal against the decision of the Native Officer's Court. The appellant appealed.

Held: in this case as the matter had not been finally decided by the Native Courts, the learned trial judge exercised his discretion properly in staying the proceedings.

Cases referred to:-

(1) *Tiamsah binte Olod* v. *Kanali* Lee, Cases on Native Customary Law in Sabah, 1973, p. 164.

(2) *Matin* v. *Laina Lee,* Cases on Native Customary Law in Sabah, 1973, p. 118.

(3) *Mandi anak Kerbau* v. *Tima anak Landa* [1950] S.C.R. 3; Lee, Cases on Native Customary Law in Sarawak, 1977, p. 19.

(4) *Indun anak Ugu* v. *Dendang anak Saing* [1953] S.C.R. 37; Lee, Cases on Native Customary Law in Sarawak, 1979, p. 47.

(5) *T.R. Manggai* v. *Government of Sarawak & Anor.* [1970] 2 M.L.J. 41; Lee, Cases on Native Customary Law in Sarawak, 1979, p. 168.

FEDERAL COURT.

K.C.I. Reddy for the appellant.

Michael Tan for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal is against the decision of the learned judge in staying all proceedings in the High Court pending the outcome of the appeal against the decision of the Native Officer's Court in Kuching.

The parties were married in October 1964. They have four children, three boys and a girl whose ages range from 9 years to 17 years. During marriage appellant made a number of investments in Malaysia in the name of respondent with the purported intention that respondent should be a trustee for him and their children. One such investment was a piece of land with buildings thereon situate at Sungei Apong Road, Kuching, described as Lot 3284, section 64, Kuching Town Land District (hereinafter referred to as Lot 3284). According to appellant not long after the transfer of Lot 3284 respondent changed her feeling for him and refused to stay with him. In fact, respondent sued him for divorce in the Native Officer's Court in Kuching. On May 15, 1974 the Native Officer's Court dissolved the marriage. Pursuant to section 41 of the Undang-Undang Mahkamah Melayu Sarawak it was held, *inter alia,* that all properties "*harta pencarian*" acquired during the marriage are to be divided between the parties in the proportion of one-third to respondent and two-thirds to appellant. Appellant appealed against the decision. Consequently, by a writ dated July 2, 1974 appellant sued respondent and claimed for (a) a declaration that he is the owner of Lot 3284; (b) a declaration that respondent held Lot 3284 in trust for him; (c) an order that respondent transfers Lot 3284 to appellant and (d) costs.

Respondent disputed the claim. She contended that Lot 3284 was an absolute gift from appellant. Alternatively, she claimed Lot 3284 to be "*harta pencarian*" and she is entitled to one-third share therein. In her counterclaim she referred to the decision of the Native Officer's Court and asked appellant: —

(1) for an account of all properties (*harta pencarian*) both real and personal acquired during their marriage; and

(2) for the transfer to her of one-third share of all such properties (*harta pencarian*). Pending appeal the decision of the Native Officer's Court is binding on them.

Appellant's counsel complained about the appeal not being heard. But in his written submission he stated that he did not take steps to enable the District Native Court to hear the appeal as appellant is not prepared to take respondent back as his wife since she has now been married to someone. There is nothing to stop him from appealing against the decision on the division of properties. He merely said he did not wish to proceed with the appeal against the decision of the Native Officer's Court on the question of properties. He said in abandoning the appeal on the division of properties, he has nothing to lose. All these are his problems. How he sought to resolve them is for him to decide. But, having agreed to be tried by a special forum to which he is bound he cannot try to avoid the decision of that forum by seeking a remedy in respect of the same property in the guise of a declaration in the ordinary forum.

The remedies he sought are available in the Native Court of Appeal. Section 9(2) of the Native Courts Ordinance (Cap. 43) makes clear that the Native Court of Appeal shall have the same powers as vested in the High Court.

Before the learned judge appellant argued that although the Native Officer's Court had jurisdiction to grant divorce it had no jurisdiction to make any order respecting division of property. No authority was cited for his sweeping proposition. Following a dissolution of marriage it is not unusual for the court granting the divorce to make a distribution order regarding the properties acquired during the marriage in appropriate shares to the parties in accordance with their customs. A guide has been drawn up to assist judges, magistrates and others on such matters. This can be found in Appendix XIV (pages 308 onwards) in "Cases on Native Customary Law in Sarawak" by the Chief Justice (Borneo), published in 1979. Appellant cannot just come round to the High Court because he does not like the decision of the Native Officer's Court. He never said the Native Officer's Court has no jurisdiction over him in the matter. But, he challenged the jurisdiction of the

Native Officer's Court to make an order dividing the properties acquired during the marriage of the parties. That question can only be decided in the hierarchy of the native court system. Both parties are Muslims. Section 5(1) of the said Ordinance provides in no uncertain terms that: —

"5.—(1) Native Courts shall have jurisdiction, concurrent with such other courts as may be empowered to try the same, over —

....

(c) cases arising from the breach of the Malay Undang-Undang or Malay custom of Sarawak in which all the parties are Muslims;

....

(f) any matter in respect of which it may be empowered by any other written law to exercise jurisdiction."

Under section 5 of the said Ordinance it is provided quite clearly that "Native Courts shall have jurisdiction, concurrent with such other courts as may be empowered" to try a variety of topics. Every Native Court has jurisdiction in cases arising from breach of Native law or custom where the parties are natives or in other matters if jurisdiction is conferred upon it by any Ordinance.

It may be useful to point out that the Application of Laws Ordinance (Cap. 2) makes provision for local circumstances in the general application of English law: —

"2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary."

Certain specific rules have been made under section 3(19) of the Interpretation Ordinance (Cap. 1). These short rules are contained in the Native Officers (Exercise of Powers) Order which makes provision for application of Native law by a Native Officer or Sarawak Administrative Officer.

The Sarawak Native Courts Ordinance is substantially the same as that of Sabah although the former may be more elaborate in many aspects, particularly, the set up of the hierarchy of the courts. Divorce on grounds laid down by custom has never been disputed by the court. In fact, it has been specifically approved by the Native Court of Appeal. The difficulty which arises on divorce concerns the question of distribution of matrimonial property. Another book compiled by the Chief Justice (Borneo) is "Cases on Native Customary Law in Sabah" published in 1973. For ease of reference those cases in Sabah will be referred to as Lee (Sabah) 1973 and in Sarawak as Lee (Sarawak) 1979.

In Sabah the usual *pencarian* rules have been enforced. See *Tiamsah binte Olod* v. *Kanali*[1] where land has been acquired during coverture the rights of children can be protected by caveat. See *Matin* v. *Laina*.[2]

It is interesting to note that in *Mandi anak Kerbau* v. *Tima anak Landa*[3] on the question whether or not the Native Court had jurisdiction to determine a matter of inheritance it was held that it did not as inheritance was not one of the topics under section 5. However, in *Indun anak Ugu* v. *Dendang anak Saing*[4] the native rules on the distribution of property of an Iban dying without issue were applied. Property classified as "barang lama" (acquired before marriage) was transmitted to the deceased's sisters. Whereas property classified as "barang bahru" (acquired during marriage) would normally be transmitted to the widow for the purpose of erecting a monument to the deceased husband. As the widow did not do that but remarried instead the property was passed to the deceased's sisters.

In the implementation of native law principles by the native courts certain misunderstandings are inevitable. There is bound to be conflict between the demands of the judicial system and the responses of a quite different legal universe. Problems relating to jurisdiction occur at the boundaries of the legal systems but not so much in the application of substantive principles of native law. Jurisdiction is in fact an important subject for determination in the Native Court of Appeal. As a final court of appeal the Native Court of Appeal has often set out clearly the limitation of Native Court jurisdiction. Reference may be made to the case of *T.R. Manggai* v. *Government of Sarawak & Anor.*[5] where appellant, instead of pursuing his appeal in the Native Court of Appeal, tried to apply for a declaration in the High Court that the Resident's Native Court was *functus officio*. In dismissing the appeal this court held that as the appellant had not pursued the alternative remedy available to him of an appeal to the Native Court of Appeal, the High Court was right in refusing to make the declaration. The case is also an authority for the proposition that where a statute creates a specific tribunal for the enforcement of any particular right, then a party seeking that right must resort to that tribunal and no other. It is, therefore, not surprising that the learned judge decided to order a stay since alternative remedy was available in the Native Court of Appeal.

The learned judge was apparently concerned over the question of jurisdiction for he pointed out in his judgment at page 33 of the Appeal Record that: —

"Against the decision of the Native Officer's Court in case No. 13/74 the plaintiff herein has lodged an appeal which is yet to be heard and the outcome of which may well affect all or some of the reliefs claimed by the parties in this action."

Although the appellant has contended, *inter alia*, that the question of the division of property was not an issue tried before the Native Officer's Court, that court, nevertheless, acting under section 41 of the Undang-Undang Mahkamah Melayu Sarawak, has made an order with regard to the *"harta pencarian"*, consequent upon the making of the decree of divorce. Any appeal against this decree being made would necessarily involve consideration of the above consequential order regarding the division of property (unless the appeal against divorce is allowed); and in this respect, the final forum to decide the appeal should

be the Native Court of Appeal in the circumstances. Otherwise the assumption by the High Court of jurisdiction to decide upon the matter of the land in question would be in effect tantamount to the assumption of jurisdiction to decide upon a matter connected with the appeal, or to anticipate the result of the appeal. It may well be that the provisions of section 5(1)(e) of the Native Courts Ordinance oust the jurisdiction of the Native Court in this respect, but any decision as to whether this is so should, in our view, on the authority of *Manggai's* case[5] be made by the relevant appellate Native Court.

The right to appeal through the Native Court hierarchy should not be denied. If a party wishes to abandon his or her right that is his or her concern. There is nothing to say that a Native Court has no jurisdiction to deal with *"harta pencarian"*. Such question should be left to the Native Court hierarchy. Whether the Native Officer's Court has jurisdiction or not is a matter for the Native Court hierarchy to decide. Until the matter has been finally decided there is nothing to prevent the learned judge from properly exercising his discretion to stay. There is no reason for us to interfere with the exercise of his discretion. Accordingly, we would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Reddy & Co.; Ibrahim & Co.*

TAN PENG LOH v. LEE AIK FONG & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 7 & September 10, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 109 of 1980]

Tort — Damages — Employee injured in accident involving lorry belonging to employer and driven by driver employed by employer — Driver to blame for accident — Whether employee entitled to claim damages from employer or from driver — Employees Social Security Act, 1969, ss. 31 & 42.

The appellant was an employee of the 2nd respondent, the owner of a lorry which was driven by the 1st respondent. The appellant sustained injuries in a motor accident and the learned trial judge found that the 1st respondent was solely to blame for the accident. The 2nd respondent was a contributor to the Employees Social Security Scheme under the Employees Social Security Act, 1969. The learned Judge found that the injuries suffered by the appellant were employment injuries as defined by the Act and he held that the appellant was not entitled to recover damages under the common law from the employer. The learned trial judge also dismissed the appellant's claim against the driver, the 1st respondent. The appellant appealed.

Held: (1) by virtue of sections 31 and 42 of the Employees Social Security Act, 1969, an insured person is precluded from recovering damages from the employer in respect of an employment injury sustained by him as an employee under the common law or any other law for the time being in force;

(2) in the absence of express exclusion of claims against fellow employees in the Employees Social Security Act, 1969, the right to recover damages at common law from the 1st respondent, a fellow employee, remains;

(3) in the absence of any statutory provision to the contrary, payments recovered by the appellant under the Act are, in common law, not to be taken into account so as to reduce the damages recoverable by the appellant.

Cases referred to:-

(1) *Che Noh bin Yaacob* v. *Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 M.L.J. 80.

(2) *Bradburn* v. *Great Western Railway* (1874) L.R. 10 Ex. 1.

HIGH COURT.

Tara Singh Sidhu for the plaintiff.

H.R. Sankey for the defendants.

Cur. Adv. Vult.

Abdul Hamid F.J.: The plaintiff's claim for damages for personal injuries has been heard and the 3rd defendant lorry driver was found to be solely to blame for the accident. Damages, special and general, agreed at $120,000 was awarded to the plaintiff against the 3rd and 4th defendants. The plaintiff's claim against the 1st and 2nd defendants was dismissed with costs.

The remaining issue is one of law namely, whether the plaintiff was entitled to sue the 1st, 2nd, 3rd and 4th defendants in view of sections 31 and 42 of the Employees' Social Security Act, 1969 (hereafter called 'the SOCSO Act').

Written submissions by the plaintiff and the defendants were submitted for my consideration.

The plaintiff was an employee of the 4th defendant Ng Yeap Phee the owner of the motor lorry driven by the 3rd defendant. The 4th defendant was a contributor to the Employees' Social Security Scheme under the SOCSO Act. It is the contention of the 3rd and 4th defendants that the plaintiff cannot maintain the action in tort against them by virtue of sections 31 and 42 of the SOCSO Act.

On behalf of the plaintiff it is submitted that —

(a) sections 31 and 42 are *ultra vires* Article 4(i) and Article 13 read with Article 4 of the Federal Constitution;

(b) he is not precluded from claiming general damages for the injuries as well as loss of amenities although he might be prevented from claiming special damages for loss of earning;

(c) he is not prevented from suing the 3rd defendant who is not the employer of the plaintiff.

With reference to (a) above it is contended that the SOCSO Act is discriminatory in that there is no intelligible differentia which distinguishes persons left out of the group from those covered by the SOCSO Act and the differentia enacted is contrary to the object sought to be achieved by the Act which is to provide certain benefits to employees in the case of invalidity and employment injury.

Mr. T.S. Sidhu appearing on behalf of the plaintiff pointed out that under the preamble the benefit is to be provided to all employees whereas section 3 excludes employees of industries which employ less than five and those earning more than $500.

I am of the view that while it may be useful in a particular case to look at the preamble for assistance to construe a particular provision in a statute and to determine the intention of the legislature the need to